Supreme Court of the United States
OCTOBER TERM, 1944

No.....

ANNIE NORTON, TRUSTEE,
Petitioner and Appellant below,

v.

TOM GREEN COUNTY,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals (R. 106) is reported in 182 S. W. (2d) 849.

JURISDICTION

1. The date of the order of the Supreme Court of Texas overruling the motion for rehearing on the Petition for Writ of Error was January 10, 1945. (R. 134.)

The Court of Civil Appeals affirmed the trial court judgment on October 4, 1944; it overruled the motion for rehearing on October 25, 1944. The Supreme Court of Texas refused to grant the Writ of Error on December 19, 1944, and overruled the motion for rehearing on January 10, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28, *U. S. C.*, Section 344(b).

3. Petitioner purchased $5,000.00 of bonds issued by Respondent at par plus a premium of $1,147.37. (R. 31, Par. 8.) At the time of the purported call date her bonds were worth par plus $1,020.00. (R. 32, Par. 13.) The purported call provides that Petitioner is to be paid only par for the bonds, and that no interest is to be paid after the call date. (R. 32, Par. 11.)

Actually this purported call is not a call for payment, the bonds are to be taken up by B. V. Christie, & Co., and paid for by B. V. Christie & Co. money. (R. 32, Par. 12.)

The action of the governing body of Respondent violates the Federal Constitution in two respects: (a) Deprives Petitioner of her property without due process of law; and (b) It is an act of legislation impairing the obligation of a preëxisting contract. All of which is more fully developed in the argument.

4. The cases believed to sustain said jurisdiction are as follows:

Murray v. Charleston, 96 U. S. 432; 24 L. Ed. 760;

State of Louisiana ex rel. Elliott v. Jumel, 107 U. S. 711; 27 L. Ed. 448;

Northern Ohio Traction and Light Company v. State of Ohio ex rel. Pontius, 245 U. S. 574; 62 L. Ed. 481;

Ohio Life Insurance and Trust Company v. Debolt, 57 U. S. 416; 14 L. Ed. 997.

STATEMENT OF THE CASE

This has been stated in the preceding petition, which we adopt for this brief.

SPECIFICATION OF ERROR

The Court of Civil Appeals erred in affirming the judgment of the trial court and holding that the order passed by the governing body of Respondent County purporting to call said bonds, to be taken up by B. V. Christie & Co., and stopping interest on said bonds was a valid order.

ARGUMENT

SUMMARY OF ARGUMENT

POINT A

The order passed by the governing body of Respondent County should be declared to be invalid because it is an act of legislation impairing the obligation of the bond contract between Respondent and Petitioner.

POINT B

The order passed by the governing body of Respondent County should be declared to be invalid and not binding on Petitioner because it is not in fact a call of the bonds for payment, but is an attempt to deprive Petitioner of her property without due process of law by coercing her to sell her bonds to B. V. Christie & Co., and at a price substantially less than their value.

POINT A—(Restated)

The order passed by the governing body of Respondent County should be declared to be invalid because it is an act of legislation impairing the obligation of the bond contract between Respondent and Petitioner.

In 1927, the Respondent County sold the bonds with the express understanding and representation that they would be non-optional bonds, (R. 31, Pars. 6 and 7) and received $12,178.00 premium by reason of the non-option feature. (R. 32, Par. 9.)

In the bonds thus issued and sold in 1927, Respondent contracted to pay 5% interest on each bond to its maturity date. Such contract was not limited, qualified or contingent. (R. 30, Pars. 1 and 2.)

On July 12, 1943, the governing body of Respondent County passed an order calling said bonds and stopping payment of interest on October 10, 1943.

The call order just mentioned is asserted by Respondent to be under authority of Article 720, *Revised Civil Statutes of Texas,* which is as follows:

> "Art. 720.
>
> "All bonds issued under this chapter shall run not exceeding forty years, and *may* be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds, or after any period not exceeding ten years, which may be fixed by the Commissioners' Court. Acts 1893, p. 112; G. L. vol. 10, p. 542."

Article 720 was enacted in 1893, but it was not self-executing in that:

(a) It does not fix a call price, or prescribe a rule by which the call price is to be determined. In this connection we wish to point out that not all callable bonds are callable at par and accrued interest. For example: City of Atlanta, Texas, bonds issued in 1936, redeemable within ten years at 2% premium; City of San Antonio Revenue Bonds of 1942, certain bonds are redeemable at a premium of ¼% for each year of the unexpired term, not exceeding 5%; Wichita Falls Refunding Bonds of 1940, part of issue redeemable after 1950 at 2½% premium; Pharr-San Juan Independent School District Bonds of 1942, redeemable in 1943 at 5% premium reducing so much each year to a minimum of ½%; Donna Independent School District Bonds of 1943, similar to Pharr-San Juan Bonds; City of Teague Electric System Revenue Refunding Bonds of 1939 redeemable at a top premium of 8.20%; Brown County Water Improvement District Bonds of 1941, redeemable after 1950 at a premium of 2½%.

(b) It does not prescribe the method of giving the notice of call. This is vital to an effective call because the bonds are payable to bearer, are negotiable, and frequently scatter into most of the United States.

(c) The italicized word "may" was substituted for the word "shall" by the legislature in 1925, prior to the issuance of these bonds. Although the court below in this case and the Texas Supreme Court, in Cochran County v. Mann, 172 S. W. (2d) 689, ruled, without explanation, that the change made no difference in the meaning of the Act, it does show that the Act was not intended to be self-executing.

In *Murray v. Charleston* (1887), 96 U. S. 432; 24 L. Ed. 760, the City of Charleston had issued some securities bearing 6% interest. Thereafter the city levied an annual tax

of 2% upon these bonds. The levy was upheld by the Supreme Court of South Carolina. The Supreme Court of the United States took jurisdiction of the case solely on the ground that a federal question was presented, and reversed the case on the ground that the tax ordinance was *legislation* impairing the obligation of the contract, *notwithstanding the fact that the tax was levied under a city charter provision authorizing such tax, which was in effect at the time the securities were issued.*

Also see *Hartman v. Greenhow*, 102 U. S. 672; 26 L. Ed. 271; *Vicksburg v. Waterworks Company*, 202 U. S. 453.

By analogy the Commissioners' Court, by its attempted act of legislation, has no more right to cancel all of the County's interest on these bonds than did the City of Charleston to cancel one-third of the interest on its debt.

POINT B—(Restated)

The order passed by the governing body of Respondent County should be declared to be invalid and not binding on Petitioner because it is not in fact a call of the bonds for payment, but is an attempt to deprive Petitioner of her property without due process of law by coercing her to sell her bonds to B. V. Christie & Co., and at a price substantially less than their value.

Neither the bonds nor the proceedings say that the bonds can be called for payment prior to their maturity.

The governing body of Respondent County passed an order calling the bonds for payment on October 10, 1943, under Article 720, *Revised Civil Statutes of Texas*, and de-

claring that no interest will be paid on the bonds after that date. Actually Respondent is not going to pay them. Petitioner and the other bondholders must sell their bonds to B. V. Christie & Co., at par, (about 20% below their actual value) or else hold a non-interest bearing obligation.

The bonds thus become the property of Christie. See Attorney General's opinion in appendix hereto.

It is true that Christie is obligated under his contract to surrender the bonds thus purchased by him for new refunding bonds bearing a lower rate of interest, but certain legal procedure must be followed for the issuance of refunding bonds. The governing body of respondent must pass an order authorizing their issuance. The bonds cannot be issued unless approved by the Attorney General of Texas. (Art. 715.) The Attorney General requires a certified copy of the order and certain other certificates including evidence that not less than 80% of the original bonds have been committed to the refunding, before he will approve the bonds.

Christie's contract to take the Refunding Bonds is conditioned upon the unqualified opinion of the Attorney General and recognized municipal bond attorneys of his selection. The conditions are reasonable and customary, but irregularities can and do happen to prevent such approvals. If such irregularities were not possible, then there would be no reason to require such approvals. It is the duty of approving attorneys to require certain provisions, recitals and certificates in order to safeguard the investment for the many years it has to run. Sometimes municipal officials decline to comply with such requirements.

If, for some reason, Respondent did not or could not issue approvable refunding bonds, Christie would be in the enviable position of having purchased the original bonds at par, and having a quick market for them at par plus 10% to 25%, or more.

We do not mean to imply that B. V. Christie & Co., or counsel of their selection, would purposely do anything to prevent final delivery of the bonds. We say this not only because there is no evidence of such intention in this case, but also because of the ill effect such practice might have upon their additional business in this now very lucrative field which has arisen since the decision in *Cochran County v. Mann*, 172 S. W. (2d) 689.

If the refunding is completed, Christie gets 10% of the saving Respondent makes in interest (Contract R. 84). What is even better, he gets the $219,000.00 of refunding bonds bearing 3½% interest, maturing serially to 1960. His profit on these refunding bonds will be substantial.

Respondent relies on *Dallas County v. Lockhart*, 96 S. W. (2d) 60. The bonds involved in that case contained a call provision on their faces and there was no evidence in that case or reason to believe that they could be worth more than par. Nor was this constitutional question raised in that case.

The injustice in this and similar situations arose because no one believed that Article 720, *Revised Civil Statutes*, applied to serial county bonds. (R. 31, Pars. 6 and 9.) The Attorney General, for at least twenty years, has held Article 720 not applicable to county bonds voted to

mature serially. (R. 51; 58; 62; 72.) The Supreme Court of Texas, however, has held that county bonds can be called for redemption under Article 720 even though such right was not mentioned in the bonds. (*Cochran County v. Mann, supra.*)

In this case the court went a step further and held that under this article the county could coerce its bondholders to sell their bonds to a dealer selected by the county and having no privity with the bondholders, even though the county had obtained a $12,000.00 premium on the strength of their being non-callable bonds.

CONCLUSION

The Court of Civil Appeals, in closing its opinion said (R. 110):

> "The final conclusion of law of the trial court reads: 'That this court is without any authority to grant plaintiff any relief, although she will be greatly damaged by the action of the defendant County in calling said bonds.' In this conclusion we concur."

We feel that the court took too narrow a view of its authority. Here the court recognized that petitioner was about to be greatly damaged; that the respondent had enriched itself $12,178.00, but held that it was powerless to prevent the wrong.

Justice Cardozo, writing in "*The Growth of the Law*", had this to say concerning such situations:

> "Judges march at time to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze

convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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